In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-217

JOSEPH A. SPAGANLO AND HARVEY TRIFLER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (Pet. 5-6) that the trial court committed plain error in instructing the jury that "every witness is presumed to speak the truth."

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioners were convicted of conspiring to conduct a gambling business prohibited under 18 U.S.C. 1955, in violation of 18 U.S.C. 371.[1] Spaganlo was sen-

[1] Petitioners were indicted with fifteen other persons. One defendant pleaded guilty prior to trial, the trial of five of the

tenced to six months' imprisonment, to be followed by four and one-half years' probation, and was fined $10,000. Trifler was placed on five years' probation and was fined $7,500 (Pet. App. 9-11). The court of appeals affirmed on June 23, 1975 (Pet. App. 7-8). Petitioners' application for an extension of time in which to file a petition for a writ of certiorari was denied by Mr. Justice Marshall on July 23, 1975. The petition was filed nonetheless on August 9, 1975, and is out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no reason to grant the writ.

The evidence at trial established petitioners' participation in a large-scale bookmaking operation. The principal evidence against them consisted of eight tape-recorded conversations between Spaganlo and co-conspirator Al Kotoch and four such conversations between Trifler and Kotoch.[2] The only issue raised here is whether the trial court committed plain error in instructing the jury that "every witness is presumed to speak the truth."[3] Petitioners contend that

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defendants was severed from that involving petitioners, the charges against one defendant were dismissed prior to trial. At the trial involving petitioners, all of the defendants were acquitted of the substantive charge in count two and petitioners alone were convicted of the conspiracy charged in count one.

[2] Kotoch was charged in the same indictment and pleaded guilty to the conspiracy charge before petitioners' trial.

[3] Neither petitioners nor any of their co-defendants objected at trial to the disputed instruction. See Fed. R. Crim. P. 52(b).

the court's giving of such instruction improperly endorsed the government's case, since the government presented numerous witnesses at trial and "the defense called no witnesses" (Pet. 6).

Petitioners' contention is without merit for several reasons. First, its major factual premise is incorrect. The defense *did* present testimony at trial (Tr. 3329-3332). Moreover, the testimony of most of the government's witnesses did not directly inculpate petitioners, but simply explained the installation and operation of the devices that had been used to monitor certain of petitioners' telephone conversations, thus providing a foundation for the introduction of the tapes of those conversations.[4]

Second, the disputed instruction was only a small part of an exhaustive charge to the jury that covered 46 pages of transcript (Tr. 3407-3452). The court repeatedly admonished the jury that it was not to convict petitioners unless it found that the charges against them had been proved beyond a reasonable doubt. The court repeated this admonition fifteen times with reference to the conspiracy count alone (Tr. 3411-3427) and twenty-two times in all (Tr. 3428-3442). The court then instructed the jury concerning its role in evaluating the testimony at trial as follows (Tr. 3442-3444):

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[4] Indeed, petitioners concede that "[i]f [the defense had called witnesses] it is likely that there would be no argument with [the court's] charge, since each side would equally benefit from its implication" (Pet. 6). This concession is particularly damaging to petitioner Trifler, on whose behalf the defense testimony was ostensibly offered (Tr. 3325).

You, as jurors, are the sole judges of the credibility of witnesses and the weight their testimony deserves. In testing the credibility of witnesses you may consider the behavior of the witnesses upon the witness stand, their manner of testifying, the reasonableness and probability of their testimony, the opportunity they had to see, hear, and know the things about which they testified, the accuracy of their memory, their candor or lack of candor, their intelligence, interest, and bias, if any, together with all the circumstances surrounding their testimony. Applying these tests you will assign to the testimony of each witness such weight as you deem proper.

* * * * *

Every witness is presumed to speak the truth; however, if you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves.

You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider also any relationship each witness may bear to either side of the case, the extent to which, if at all, each witness is either supported or contradicted by other evidence.

You may apply these and other tests of truthfulness which you are accustomed to apply in your daily life to weigh and determine the value of the statements of each witness.

> You are not required to believe the testimony of any witness simply because he or she was under oath. You may believe or disbelieve any witness wholly or in part.

The court also cautioned the jury that it should not single out any one instruction, but that it should consider the charge in its entirety (Tr. 3408).

Finally, this Court recently upheld a virtually identical charge in *Cupp* v. *Naughten*, 414 U.S. 141. On the facts of that case, which involved a state prosecution, this Court concluded that "the giving of [an] instruction on the presumption of truthfulness is not [a matter] of constitutional dimension" (*id.* at 149). If anything, the facts presented by the record in this case are even less favorable to petitioners' contention than were the facts in *Naughten*. In *Naughten*, the prosecution had presented the testimony of two eyewitnesses to the armed robbery for which the petitioner was ultimately convicted, as well as the testimony of two policemen who had apprehended him. The defense had not called any witnesses. At the conclusion of the testimony, the trial court had twice instructed the jury concerning the presumption of innocence and the government's obligation to prove petitioner's guilt beyond a reasonable doubt. Here, in contrast, the defense had presented testimony, and the most damaging evidence against petitioners was not the testimony of government witnesses but tape recordings of certain of petitioners' conversations. Furthermore, the phrase "beyond a reasonable doubt" was used here twenty-two times

to describe the government's burden of proof. Thus, rather than constituting plain error, we submit that the disputed instruction was—on the facts of the present case—entirely proper.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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